

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 8-94:

CITY OF GREAT FALLS, GREAT)	
FALLS, MONTANA,)	
)	
Petitioner,)	RECOMMENDED FINDINGS OF FACT;
)	CONCLUSION OF LAW;
vs.)	FINAL ORDER
)	
INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, LOCAL #8,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

The requested, in-person hearing in this matter was heard in Great Falls on May 23 and May 24, 1995, before Hearing Officer Stephen L. Wallace. David V. Gliko, City Attorney, represented the Petitioner. Timothy J. McKittrick, Esquire, represented the Respondent. Sworn testimony was received from: James Hirose, Fire Chief; Richard Meisinger, former Fire Chief; John Lawton, City Manager; Linda Williams, City Personnel Director; Robert Jones, Police Chief; Wayne Young, Deputy Fire Chief; Talbert Bryan, Engineer; Howard Clos, Captain; Charles Rovreit, Engineer; and Dean Mora, Battalion Chief; and Ron Meyers, Engineer.

In contrast to many hearings before the Department which are specifically exempted from the statutory and common law rules of evidence, this hearing comes under Montana's Administrative Procedure Act (Section 2-4-601, et. seq., MCA) pursuant to Section 39-31-105, MCA. The parties' proposed exhibits were offered one at a time during the hearing, with foundation laid, and some voir dire, as noted in the transcript of these proceedings.

In actual sequence, the Petitioner's proposed Exhibit C was admitted without objection. Petitioner's Exhibits A and B were admitted over relevancy objections, noting these documents reflect the opinions of John Lawton, rather than necessarily being factual accounts of labor negotiations contained therein (See Transcript, hereinafter "TR" at 13 - 15). Exhibit D {Petitioner's response to an Unfair Labor Practice charge} was admitted over relevancy objections, with the proviso that the parties had signed a stipulation of DISMISSAL WITH PREJUDICE, and the initial ULP, as protected activity, did not substantiate "conflict" to the degree alleged by the Petitioner.

Petitioner's Exhibit E was admitted without objection. Petitioner's Exhibit F was admitted over the hearsay and speculation objections, as the affiant, John Lawton, was present to testify. Exhibit F was admitted with the specific notation

that Exhibit F contains John Lawton's speculation on union "motivation" and what the union "clearly understood."

Petitioner's Exhibits G, H, I, J, K and L were admitted over continuing foundation objections; Exhibits G, H, I, J, K and L consist of the Petitioner's compilations of December 21, 1992, January 13, 1993, March 8, 1993, July 12, 1993, March 13, 1993, and July 11, 1994, minutes/notes of Battalion Chiefs' (hereinafter "BCs") meetings of those dates, and are not notes generated by the BC's themselves. Exhibits J, K and L also contain hand-written notes made after those meetings by Jim Hirose.

The Petitioner's proposed Exhibits N and O were admitted over hearsay objections, as both Dean Mora and Wayne Young were to testify, and did testify concerning Exhibits N and O, which they authored, respectively. Petitioner's Exhibits P, Q and R were admitted over relevancy objections, as they were offered to address the BCs' alleged failure to exercise initiative in disciplinary matters. Petitioner's proposed Exhibit S and its three hand-written attachments were admitted over relevancy objections with the proviso that this affidavit of Jim Hirose contains Mr. Hirose's personal understanding of what the union understood during the last contract negotiations.

Petitioner's proposed Exhibit U was admitted over relevancy objections. Exhibit U consists of the current Fire Chief/Emergency Services Coordinator's position description as revised at the Petitioner's request by Carl Becker and Company. Petitioner's Exhibit V was admitted over the objection that this Petitioner-adopted and currently effective job description for the BC's was never negotiated with the union and represented a unilateral change in terms and conditions of employment. Petitioner's Exhibit W consists of the BC's former job description used by the Respondent. Exhibit W was admitted over objections that it was never negotiated with the bargaining unit and never formally adopted by the City Commission. The Petitioner's Exhibit X was admitted over hearsay and relevancy objections, as the affiant, Linda Williams, was present and testified concerning her own affidavit.

A thorough review of the transcript indicates that no formal offer was made for the Petitioner's proposed Exhibit M. Exhibit M was formally identified and timely exchanged on May 2, 1995, and consists of a Fire Department (also referenced herein as "FD") reprimand dated November 5, 1993. Counsel for the Respondent never objected to this document. Counsel for the Respondent also asked questions of a witness concerning Exhibit

M. Due to what might otherwise be considered a procedural oversight, this document is admitted into the record.

Petitioner's Exhibits A-1 through F-1 were admitted without objection. Exhibits G-1 and H-1 were admitted over relevancy objections, as these two exhibits relate to the Petitioner's contention of a "grievance problem." Petitioner's Exhibits I-1 and J-1 were admitted without objection. Petitioner's Exhibit T was admitted over a relevancy objection; this document concerns a new position description for the Battalion Chiefs developed by former Fire Chief Meisinger. The Petitioner's proposed Exhibit K-I was admitted over relevancy objections and accorded due weight; Exhibit K-I, the police lieutenant's job description, at least goes to the contention of comparability of that position to the BCs'. **The Respondent's proposed Exhibits** 1 through 4 were admitted without objection. The Respondent's proposed Exhibit 5 was admitted over relevancy and timeliness objections. Exhibit 5 is a BC's pay stub and allegedly goes to whether the BCs are salaried or hourly workers, and therefore is a relevant document. The parties reserved the right to offer impeachment and rebuttal exhibits, and Exhibit 5 is also admitted for these reasons. The Respondent's Exhibits 6 through 9 were admitted without objection.

There were numerous objections from both counsel concerning leading questions and speculation by witnesses. Much of the testimony, particularly by the Petitioner's witnesses, involved characterization of motivations of persons other than the individual testifying and speculation by management personnel about union motivation. Given the nature of the parties' strongly divergent contentions about appropriate roles and interaction of public sector workers and the overall good of the City, opinion testimony was necessary, but is accorded due weight.

A certified transcript of the proceedings was prepared at the request of the petitioner, joined in by the respondent.

Upon receipt of the post-hearing briefs on September 21, 1995, the case was deemed submitted.

Given the level of highly divergent positions which came into focus during this hearing, certain **disclaimers** by the Hearing Officer are found to be in order. The undersigned has no known close or distant family members or close friends who are or ever have been members of a fire department (paid or volunteer), police department, or who could be considered as closely associated with management or union. For a few months in 1974, by virtue of part-time produce department work for a large grocery store chain in the metropolitan Washington, D.C.

area, the undersigned was a nominal member of a retail clerks' union.

II. ISSUES TO BE DETERMINED

Should the City of Great Falls Fire Department's Battalion Chiefs be removed from their long-standing membership in the recognized bargaining unit, the I.A.F.F., Local No. 8?

The Hearing Officer frames four main sub-issues which flow from the above general issue:

1) Have the threshold requirements of ARM 24.26.630 for filing a petition for Unit Clarification (UC) with the Board been met? Conversely, has the Petitioner waived the right to challenge the BCs' membership in the recognized bargaining unit by signing a series of bargaining agreements and through the Petitioner's failure to acquire express union permission to file this UC?

2) Is the position of Battalion Chief that of a "management official" or "supervisory employee" according to Section 39-31-103 (7) and (11), MCA, and hence, by definition, not a "public employee"? This sub-issue, and these two statutory exclusions, raise the interplay and possible conflict with the "grandfathering" statute of Section 39-31-109, MCA.

3) Do the Battalion Chiefs continue to meet the Board's tests for inclusion in an "Appropriate Unit" as defined at ARM

24.26.611? {See, National Labor Relations Act, Section 9 (b) for appropriate unit criteria}.

4) a. Does the Battalion Chiefs inclusion in the collective bargaining unit create a "conflict of interest" (See "policy" for public employee collective bargaining at Section 39-31-101, MCA)? If any evidence of "strife" or "unrest" exists, can its cause(s) be ascertained?

b. What impact, if any, may "strife" have on the BCs' potential removal from the collective bargaining unit in light of the Montana Supreme Court's strict guidelines for such removal enunciated in City of Billings v. Billings Firefighters, Local 521 and Board of Personnel Appeals, 200 Mont. 421, 651 P.2d 627 (1982)?

At the earliest possible time the respondent raised alleged federal and state constitutional issues of protected activities, said to be violated by the petitioners' requests herein. The Hearing Officer acting on behalf of the Board lacks subject matter jurisdiction to adjudicate constitutional issues {Jarussi v. Board of Trustees, 204. Mont. 131, 664 P.2d 316 (1983)}. Therefore, these requested issues cannot be addressed, but are acknowledged for any further appellate review.

Additional contentions raised by both parties are contained in their jointly submitted PRE-HEARING ORDER (The Petitioner

enumerated 13 proposed issues of fact, and 3 issues of law; the Respondent framed 15 issues of fact, and 12 issues of law). To the extent that the numerous contentions are relevant to this Unit Clarification and can be addressed in this forum, they will be addressed as either factual disputes or as issues of law as framed above.

Some of the proposed "issues of law," as framed by the parties' counsel, are actually factual issues, or go beyond the scope of this hearing and are not properly before the Board, or the parties failed to submit credible evidence or arguments in support of their proposed "issues of law."

The undersigned further notes that this case does not present any issue of overtime pay pursuant to the Fair Labor Standards Act of 1938 as amended (FLSA), 29 USC Section 201, et. seq. The parties submitted no "tests," no state or federal statutes or copies of any administrative rules in support of the Petitioner's implied claim that the BCs meet the requirements for "executive," "professional," or "administrative" exemptions from the operation of state or federal overtime laws. Whether the BCs are "salaried" is examined herein, but is not ultimately determinative.

III. FINDINGS OF FACT¹

1. The following four (4) "agreed facts" [numbered below as 2 through 5] are adopted verbatim as fact (Parties Joint Pre-Hearing Order):

2. The bargaining unit represented by I.A.F.F., Local No. 8, is described in Article 2, Subsection 2.1 of the Collective Bargaining Agreement, entered into between the Petitioner and Respondent with an effective date July 1, 1993 through June 30, 1995.

3. The collective bargaining relationship between Petitioner and Respondent has existed since prior to July 1, 1973.

4. But since at least 1967 and continuing to the present date, Battalion Chiefs have always been members of the collective bargaining unit represented by Respondent Union.

5. That in the contract negotiations which resulted in the extant collective bargaining agreement, the City proposed to have the Battalion Chiefs excluded from the bargaining unit. The City, thereafter, withdrew that proposal.

¹All proposed findings, conclusions and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings, conclusions and arguments may have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

6. On June 16, 1994, the Petitioner through John Lawton filed the Unit Clarification to exclude the BCs from I.A.F.F., Local No. 8. The respondent filed a MOTION TO DISMISS on August 5, 1994 (Administrative file; Petitioner's proposed findings/procedural background).

7. No question concerning Respondent representation was presented. No change of the recognized bargaining representative/union has been contemplated at any time in question. There was no allegation that the parties were engaged in contract negotiations or that they were within 120 days of the expiration date of the extant agreement {June 30, 1995} at the time of the Petitioner's UC filing. There was no evidence that a petition for clarification had been filed with the Board concerning the same unit within the 12 months immediately preceding the UC filing {ARM 24.26.630(1)}. No procedural defect in names, descriptions, addresses, number of copies to be filed with the Board, or any other itemized requirement of ARM 24.26.630(2) was alleged deficient by the Respondent (Administrative file; parties' pre-hearing briefs).

8. Following briefing, the undersigned denied the Respondent's MOTION TO DISMISS by an ORDER on November 18, 1994. After briefing the Respondent's MOTION FOR SUMMARY JUDGMENT was denied by ORDER dated January 18, 1995 (Administrative file).

9. The underlying reasons the Petitioner seeks to remove the BC's from their long-standing membership in the recognized bargaining unit can, at least in part, be gleaned from a fair, representative, and necessarily lengthy sampling of Mr. Lawton's own words to the Mayor and City Commission regarding the Battalion Chiefs and costs to the City in undated Exhibit A and Exhibit B (November 2, 1993):

One is that they {the union} must allow the contract to be changed to allow longer work periods... **This is unconscionable given the pressure on municipal government to improve productivity and to make better use of tax dollars.** (Exhibit A, p. 1; emphasis added)
...Right now, they {the BC's} are viewed as shift commanders and are working the same shifts as the rank and file troops. **We need them as managers and,** in fact, their job is management even though they are in the union. (Exhibit A, p. 1; emphasis added)
The reality of the situation is that we can not meet the work that MUST be done for the fire department to survive in the long run. The majority of the problem rests with the unproductive work schedule they have with unconscionable work periods. (Exhibit A, p. 1)

... With the concept of having to do more with less, the Battalion Chief positions stand out like a sore thumb... They are the last of a dying breed. (Exhibit A, p. 2; emphasis added)

We told them one of the options we are considering is to create up to 3 assistant chief level positions that would be responsible for and be held accountable for the **three critical areas that the BC's have**

been ineffective at for numerous reasons. Because **we are locked in by a contract with grotesque work rules, we would allow the BC's to exist** on the public payroll until they retire... The Union has filed an **Unfair Labor Practice charge** with the State Board of Personnel Appeals on the BC issues. We have prepared a vigorous defense and, with your approval, **expect to carry this all the way to the Supreme Court if necessary...**

(Petitioner's Exhibit A, 1 and 2; emphasis added)

And I would just digress a minute to say that **I think our discussions have been respectful** and they have been {sic} or disagreements have been on agreement to disagree basis. **I don't think we have had the kind of animosity that we often get with disputes between labor and management...** (Exh. B, 3; emphasis added)

...We have a good Fire Department, we have a good record of how we deal with fires, and a lot of {sic} there is some truth in what they say but I say that only in the traditional sense... Also, by the standards of the 1993 **taxpayer demands for holding the line on taxes** and improving customer service, the traditional system {sic} always the traditional system just doesn't cut it. It's time to change. **The system is wrong. It's broken and it's going to change whether the firefighters sit down and agree or not.** (Exhibit B, p. 4)

...I have great respect for them and I have great respect for what they do, **but it's already becoming a cliché like reinventing government** about good people caught in a bad system. And that's just the way I look at the firefighters. **They're not only good people, they are excellent people, but they're caught in a very bad system.** (Exh. B, 4; emphasis added)

Thereagain, battalion chiefs real function is to supervise the fire ground at a structure fire, I mean that's the guts of what he does.

(Exh. B, 8; emphasis added; also see TR at 8)

...We have had no success in changing that into anything that gets anything **that I recognize as productivity.** (Exh. B, 10; emphasis added)

10. In Fiscal Year (FY) 1996, the City had 438 employees. There were approximately 65 employees in the Fire Department. Mr. Lawton is appointed by the City Commissioners and answers to the elected Commissioners. Mr. Lawton is responsible for all hiring and firing of City personnel and supervision of all City services. Mr. Lawton appoints the Fire Chief, then the Fire Chief appoints the Fire Marshall and the Deputy Fire Chief (until recently the Deputy Chief has been classified as the Assistant Fire Chief; TR at 91; testimony of J. Lawton, TR at 4 - 6).

The Chief and the Deputy Chief supervise all others. The Fire Marshall, somewhat in a side box, does not supervise the Deputy Chief. The Battalion Chiefs supervise the Captains. The Captains supervise the Engineers. The Engineers, however, do not supervise the Fire Fighters or probationary Fire Fighters (TR at 28, 29).

11. During the contract negotiations that took place over the contract which ended June 30, 1995, the City sought to negotiate the BC's out of the bargaining unit (TR at 143 - 146).

The record is replete that among the City's proposals were the transfer of the BC's duties to newly to-be-created Assistant Fire Chiefs, who were to be appointed as the incumbent BC's retired (TR at 5, 6). A ULP was filed, the City answered, and a STIPULATION FOR DISMISSAL WITH PREJUDICE was signed by the parties January 18, 1994 (Exhibits C - E). This Stipulation contained no reservation by the City to file the current and intricately related Unit Clarification petition.

12. John Lawton became City Manager April 16, 1990. His preceding jobs were Assistant City Manager in Billings, Montana and the Billings' Director of Finance and Administrative Services (TR at 4, 26). In his 11 years in Montana, John Lawton has held responsibility for labor relations. As long as 20 years ago, Mr. Lawton believed that Fire Department Battalion Chiefs did not belong in a union: "...it's been my opinion that battalion chiefs should be excluded from the union... It would be by any manager. Ask any city manager." (TR at 29, 30; emphasis added). Mr. Lawton added that the opinion to exclude BC's from the union "...may have been others as well." (TR at 30)

13. Mr. Lawton's attitude toward the BCs' and the importance the City Manager attaches to the BCs' functions and responsibilities is reflected throughout his testimony, including unattributed hearsay:

The **battalion chiefs to this day are ridiculed ... [T]hey're ridiculed** among the rank and file employees... So we felt that to increase productivity and **to get the management tasks done** that we needed to have done, we needed to have full value from the battalion chiefs, so we proposed both extraction from the union or severance from the union...

...we proposed was to leave the current battalion chiefs in place with their titles and positions until they retire, because they would, in effect - **just leaving them there would be harmless since they don't do very much anyway.** And **we had proposed to bring in two or three additional assistant chiefs to fulfill the management functions** that were not being taken up by the battalion chiefs because of the resistance of the union to any change. **...and then abolish those positions** when they did retire... (TR at 10; emphasis added)

I prepared the offer and then I prepared a history of the negotiations and of the reasoning behind our proposal, **with emphasis on the management functions that the chief [Meisinger] had asked the battalion chiefs to perform** but were unable to because of their union membership. (TR at 12; emphasis added) **We want them to do more things that aren't being done right now.** Most departments this size would have a training officer, for example. (TR at 16; emphasis added)

Q: And that **overtime pay requirement** is pursuant to what requirement? The time in excess of their normal shift responsibilities.

A: If they were not union members, we could schedule them... where they all need to be together **without the incurrence of overtime.** (TR at 18; emphasis added)

Absolutely **because management would then control the shifts** and the shifts scheduling... **We could do it at a lower cost** because it wouldn't require overtime. (TR at 19, 20; emphasis added)

Q: you state under Item 2 that long before, long before entering into negotiations, **exclusion of battalion chiefs from the unit was deemed necessary to create a management team for the fire chief**, to enable proper management of the fire department, **inclusive of but not limited to the additional duties** of training, equipment, facilities maintenance, and hazardous material training and planning. (TR at 23; emphasis added)

A: Because we are going to **have to change the way we do business in order to give the taxpayers the best bang for the buck**. We're not going to be able to do that over night and **I view these collective bargaining issues as steps in a long process to eliminate alarm time**, over time, and to make all work time productive time... (TR at 48; emphasis added)

14. The Fire Department Captains are regarded as part of management, to a degree. They are considered by John Lawton as the first line supervisors, but are not part of this petition. Captains plan and direct their crews and company. Captains are likened to lead workers. They may issue oral and written reprimands (TR at 29, 32, 45 and 92).

15. There have been very few new hires in the Fire Department since John Lawton came to his position in April, 1990. Approximately eight laid off workers were eligible for recall pursuant to contracts negotiated with the Respondent and after

John Lawton's approval. Two or three of these eight firefighters did not return to the FD. Since Ron Meyers came on board in 1984, there have been 15 or 16 new hires, in addition to the five or six above.

BCs' did not sit on interview panels until a month or so before the hearing. The Petitioner submitted no documentary evidence to contradict Mr. Meyer's knowledgeable figures (TR at 315). **Within a month or so immediately preceding the instant hearing, as the Petitioner's witnesses were uncertain about dates, two new Fire Department workers have been hired.** Joe Russel was hired the week of the hearing, and Chad Cortman was hired a little earlier (Testimony of L. Williams, TR at 207).

A BC was ordered to sit on at least one of those oral interview/hiring panels, and by the Petitioner's history, BC Ron Bidwell may have been directed to sit on possibly one other panel. The BC's vote carried no particular weight. John Lawton initially testified that the only limited Fire Department transfers were among stations, and later testified that he lacked knowledge of any transfers by BC's (cf. TR at 7 and 32, 33).

16. The only credible testimony on how performance appraisals are treated by Fire Department management came from Howard Clos. Mr. Clos' credible and accepted testimony (herein) contradicted John Lawton's testimony, that BCs' evaluations

should be used in promotion of Department personnel (TR at 7, 8). Management places little value on the BCs' evaluations.

17. John Lawton claimed that "numerous grievances" had been filed, but referenced only two. **Upon cross-examination John Lawton admitted that when differences between management and workers arose, they had been settled according to the contract procedures.** John Lawton admitted that in his experience, Captain Oswald's grievance had gone further (District Court) than any other municipal worker's. It was uncontroverted that many potential labor problems are addressed first by the [union] Executive Council [the "E" Board], and never come to the City's attention. No baseline for a "reasonable number" of complaints was attempted by the parties.²

18. Mr. Lawton believes in a "consultative" process, and indicated that "judgment and common sense" would dictate consultation all the way up the line to him on any "serious disciplinary matter." **By statute the BCs lack the disciplinary authority the Petitioner has recently presumed to grant them or claimed they already have.** BC's lack unfettered authority to resolve grievances or to impose discipline. By statute, only the

²Summaries of grievances are included within these findings. The Hearing Officer is mindful that this is a UC case and not a ULP. Both parties introduced much evidence regarding whether the grievances support the removal of the BCs from the unit, or whether the grievances reveal something else. How the grievances came about is found to be relevant to the BCs' work duties.

mayor, city manager, Fire Chief or his Assistant Chief may suspend other firefighters, within a formal process (Sections 7-33-4123, and 7-33-4124, MCA).

The experience of the incumbent Fire Chief, Jim Hirose, is instructive here. Mr. Hirose, while a BC himself, attempted to discipline a fellow firefighter for dress code violation. The then BC Hirose's suspension of a fellow firefighter for a day was immediately countermanded by the Assistant Chief. (TR at 8

and 31). 19. The mere use of military titles within the Fire Department ranking does not prove the Petitioner's contention that the Fire Department "is a paramilitary organization." (TR at 25) Fire Department staffers were not shown to carry weapons, or to be authorized to use deadly force, make arrests, or quell civil disturbance.

Administrative notice is taken, that fraternal and service organizations such as the International Order of Foresters, the Salvation Army, and more recently, groups of Montanans engaged in civil rebellion, use "military" titles. Comparability to the Police Department has not been thereby established or linked, except by managerial fiat. **Moreover, the essence of the "paramilitary" argument was emphatically rejected by the Montana Supreme Court** in McKamey v. State, 268 Mont. 137, 885 P.2d 515 (1994).

20. Police Lieutenants are now exempt or considered management. They are regarded by Police Chief Jones as shift commanders. Their non-union status unquestionably saves the Petitioner money and provides "flexibility" in scheduling manpower. Chief Jones never read the BC's position description before testifying on the alleged similarity to his own lieutenants (Testimony of R. Jones).

21. The City Commission paid for a survey of the public's attitude toward the Fire Department among Great Falls' citizens. A highly favorable rating was disclosed by the survey (TR at 42).

22. In keeping with state law, Fire Department members have never gone on strike or refused to cross a picket line according to uniform testimony of both parties' witnesses (TR at 42).

23. There have been no BC's on the Respondent's labor negotiation team (Testimony of J. Lawton and R Meyer). The Petitioner's "bargaining team" for the previous contract negotiations included Chief Meisinger, Deputy Chief Hirose, Linda Williams, Jerry Sepich (the Director of Parks and Recreation), who conferred with John Lawton. The Petitioner had the benefit of legal counsel (TR at 90).

24. John Lawton hired Richard Meisinger as Fire Chief, effective November 23, 1992. (TR at 49) Mr. Meisinger had no experience as a Fire Department officer within an organized labor

union, or any experience with collective bargaining. His extensive fire department background was in Colorado and Kansas. His former employer refused to recognize a local fire department union (TR at 84). Richard Meisinger came to Montana with the idea that Battalion Chiefs should be excluded from organized bargaining units.

25. In examining the evidence as a whole, The Petitioner failed to show that it currently lacks full authority to schedule and control Fire Department personnel as the Petitioner sees fit.

26. Mr. Meisinger was paid \$1,200.00 in addition to all travel expenses for his testimony (TR at 86).

27. At the time of hearing, there were four BC's in the collective bargaining unit. Those BC's, with combined experience exceeding 100 years, were Gary Stewart, George Sisko, Dean Mora and Ron Bidwell (Respondent's proposed finding no. 13).

28. A Petition was signed in the spring of 1995, by forty-seven firefighters, requesting that the BC's remain in the unit.

The Petition asserted that the BC's union membership had caused no strife within the unit. Wayne Young, now Deputy Chief, was

one of those signers. All four BC's signed. It was uncontroverted that only one firefighter refused to sign. The difference between 47 signers and a total complement of 60 members in the local, reflects that the Petition circulator, Ron

Meyers, was unable to personally contact all Fire Department members over a couple of days due to work scheduling, vacation and sickness (TR at 326).

29. The Petitioner's attitudes toward the BC's, is at least partly reflected in Mr. Meisinger's own words:

[The idea of excluding BC's from the unit also came from Mr. Meisinger] My very first staff meeting in December of 1992... I was not happy that I had to pay the battalion chiefs time and a half... (TR at 52)

They should not be union members... battalion chiefs within this department represent the union... Management should run the fire department...

[In reference to the BC's] **I would say that we had to force feed them on certain issues...** Their concerns were to protect and look out for the labor side of issues...

...I can tell you that it put me in a position where my management team was basically cut in half, **because of, I would say, the undermining that was done by the three battalion chiefs** when controversial or issues that maybe they did not agree with, **because they would take them out and share them with other personnel in the organization,** and therefore, **we started excluding them [the BC's] from our conversations and some of the decision making process that they should have been involved with.** (TR at 56; emphasis added)

...the battalion chiefs are going to take care of their own, and that means they're going to look out for the union... (TR at 58; emphasis added)

[In answer to whether the BC's were involved in the planning and directing work] **Initially, they weren't involved in a lot of things,** but as I identified some needs... first we asked them to volunteer... **and only one of the three volunteered, so we assigned...** (TR at 59; emphasis added)

Because of this grievance being filed. It just seemed like every time that the local saw a chance to prove a point, they would jump on it, at least during my tenure. And the contract was an issue that they constantly were there to remind me, and that's fine, but - so we made sure it was in the new one, that we had the ability to take care of the organizational needs. (TR at 67; emphasis added)

These things occur and **this community doesn't want to pay to have 200 fire fighters** so we'll have to do what we can with our resources... **Their allegiance lies with the union, doesn't lie with the city or the citizens like a chief officer should have their allegiance lying with the Department and the policies within the organization.** (TR at 71; emphasis added)

[Mr. Meisinger read from his own deposition.] **I let my battalion chiefs know right up front that I did not want them in a bargaining unit because I felt management was compromised by them being part of the bargaining unit.** (TR at 87; emphasis added)

Q: You rewrote job descriptions for battalion chiefs, correct?

A: I, what you need to realize is I had input but not any more than battalion chiefs did on their job descriptions... Attempted to give them more responsibility that went already with the authority that was already in place by their old job descriptions. (TR at 89)

Q: So you attempted to give them more responsibility?

A: Yes sir. (TR at 90)

Q: Now battalion chiefs, they get paid **overtime compensation**, do they not?

A: Yes, they do. [pursuant to the collective bargaining agreement] (TR at 92)

Q: Do the, the fire chief, the fire marshall, and the assistant fire chief, do they get paid overtime compensation?

A: No sir. They don't get anything, they're salaried. (TR at 92)

Q: Doesn't information flow both ways?

A: Supposed to.

Q: Okay. But you didn't want it flowing from you down to the unit through the battalion chiefs.

A: That's true. On some issues I did not. (TR at 107; emphasis added)
[In regard to the additional duties the BC hazardous materials, training and maintenance officers were assigned]

Q: Were those additional duties ever negotiated with the union?

A: No.

Q: Did, during contract negotiations, the item of bargaining saying, "We propose to pay the various officers straight time for this additional training," did that ever come up?

A: No. (TR at 108; emphasis added)
[In answer to whether the firefighters and the BCs gave any recommendation on the purchase of a "quint," - a large, pumper/ladder truck]

No, I made that decision as fire chief to buy - to purchase a quint in the future. (TR at 109; emphasis added)

I formulated my decision on and then handed that decision down to a - we put together an apparatus committee consisting of captains and engineers to develop the specifications for that piece of apparatus after we decided here's what we're going to purchase. I had decided that after listening to input. (TR at 111)

If we tried to negotiate every little additional duty or training that we wanted to send a chief officer [Mr. Meisinger's alternate term for a BC] to, now, you want to talk about hamstringing an organization, so that's

why **I pursued and tried to negotiate them out, because there are numerous issues that management is involved with.** Therefore, you know, **to bring one issue as a specific issue at the bargaining table would - it's almost ridiculous.** (TR at 111 and 112; emphasis added)

I wanted the battalion chiefs to do their job, and **I wanted them to be salaried** to do that job. (TR at 113)

30. Then Chief Mesinger demanded explanations from four Captains who failed to attend a meeting. Three Captains gave written reasons. Mr. Meisinger directed the Captains' BCs to furnish him the explanatory letters. Captain Oswald's written explanation so displeased Mr. Meisinger that the Chief suspended Oswald without pay for 48 hours and placed him on probation for one year. Mr. Meisinger was also upset with the BC, and believed that the BC should not have conveyed Oswald's explanation, and that the BC should somehow have anticipated that [the letter] "It's going to make him mad." Mr. Oswald's grievance is pending according to Mr. Lawton (TR at 73 and 100 and Exhibit H-1)

31. When management was busy, overlooked, and thereby failed to perform a certain contractual obligation [establish and post tests for potential BC promotions every other year], Chief Meisinger expected understanding from the union, rather than a grievance (Exhibit I-1; and Article 20.2 of the CBA). **Due to on-the-job injuries and off-the-job occurrences, management allowed Department staffing to fall below contractual minimums in part to**

conserve overtime pay (TR at 74). Based in part on safety for the City concerns, the union filed a grievance (Exhibit J-1).

32. A previous contract allowed at least two FD members vacation days off for a given shift throughout the year (Exhibit A-1). When management memos of January 25 and August 19, 1993, ordered that vacation leave could not be taken during fire prevention week, a grievance ensued based on contract violations (Exhibit B-1). This was later resolved informally, as the vacation was canceled (the fire fighter got his deer hunting) and other fire fighters offered to cover for the fire fighter in question (TR at 103). The Petitioner introduced contract language to obviate such misunderstandings, and the contract process worked.

33. Chief Meisinger forbade union meetings at fire halls, in contrast to all past practice and despite paying lip service at the hearing of their right to meet. He instituted his new policy during contract negotiations. Mr. Meisinger admitted his actions could be seen as "**antagonistic**." (TR at 105).

Following a grievance, the Chief adopted a new policy and rescinded his order forbidding union meetings. The Chief's earlier reason, that multiple fire trucks were inappropriately used, was clearly contradicted by Charles Rovreit and the union roll book. Mesinger's purported reason proved false and is again

representative of his animus toward his organized workers (TR at 294).

34. BC Mora was directed by the Chief to contact the Billings Fire Department to obtain a copy of their established training or proficiency standards, and "quint" specifications (TR at 75, 76). Chief Meisinger pointed Mora in that direction because, in Mr. Meisinger's words "...why reinvent the wheel?" BC Mora obtained specifications from the Billings Fire Department. Mora's efforts were criticized and those new duties re-assigned to BC Bidwell.

35. The City and Chief Meisinger re-wrote the position description for Battalion Chief. The BCs' themselves were granted some opportunity for input. Chief Meisinger's new job offering (Exhibit T) emphasizes that applicants need be aware the job may become exempt or non-union.

36. Chief Meisinger, despite a contrary recommendation of the majority of the staff, decided to purchase a "quint,". There was no credible evidence that BCs' influence the selection or acquisition of other tools and equipment. The assertions of Messrs. Meisinger and Lawton as to the power of the BCs' is rejected as less reliable than the credible testimony of Talbert Bryan, Howard Clos, Charles Rovreit, Dean Mora and Ron Meyers.

37. Chief Meisinger refused to allow a BC to grant vacation days off. Chief Meisinger denied Ron Meyer's request in August 1994. The reason cited was budget shortage; the other reason cited by Chief Meisinger pertaining to another firefighter being off was not accurate (TR at 310; Exhibit 8)

38. George Sisco's attempt as a BC to exercise limited shift transfer of an engineer was countermanded and punished by Chief Meisinger (Exhibit 3). BCs' cannot "transfer" firefighters, but have limited authority to "trade" workers to cover a shift, but only subject to higher managerial authority. BCs' may assign members of their platoon to any station or piece of equipment deemed appropriate. Even transfers such as these may be discussed with the Chief or Deputy Chief, according to James Hirose (TR at 118).

BC Sisco sought to keep the engineer to keep off his shift/platoon because the engineer had verbally denigrated co-workers. Howard Clos' credible testimony on this version of events was uncontroverted. BC Sisco's men complained about the individual causing the actual conflicts (TR at 284). Chief Meisinger punished and suspended BC Sisco for exercising his limited authority and for BC Sisco's seeking to prevent a disruptive person being traded into his platoon. Chief

Meisinger's action, in essence, undermined the authority the Petitioner bestowed upon the BCs:

Article 4 of the City's Rules and Regulations as it relates to BCs, states (Respondent's proposed finding no. 21):

They shall under direction of the assistant fire chief and/or fire marshall have full command, control and responsibility of a platoon and shall be responsible for the condition, discipline, efficiency, detailing of subordinate members and notifying their supervisors of such actions.

39. Battalion Chiefs are paid overtime at time-and-a-half. They may be docked pay for leave when sick pay or vacation is not taken. BCs' are scheduled far in advance and usually work predictable schedules.

The City labels the BCs "salaried" for the Petitioner's administrative and contract purposes, as the BCs' hours do not regularly fluctuate as much as part-time City employees. The Petitioner calls workers "salaried," as opposed to hourly, if their regular schedule is 72 hours, bi-weekly, or 96, as reported for firefighters (TR at 220).

There was no formal presentation of evidence that the BCs met all elements of "salaried exempt" tests as professional, executive, or administrative employees (ARM 24.16.204). {Certain federal court cases are examined in the CONCLUSIONS OF LAW section as they impact this case.} (TR at 77 and 92).

40. BC Dean Mora's pay stub for the pay date of April 20, 1995, indicates a per hour rate of \$18.03. For this pay period, he earned four hours of overtime at time and a half (Exhibit 5).

Credible and uncontradicted testimony of Engineer Ron Meyer's explained firefighter's general pay scheme. Through collective bargaining, firefighters now work a forty-two hour typical week. However, they have agreed to be paid at straight time for up to 53 hours a week, or 212 hours in a twenty-eight day period. They agreed to the 10 and fourteen shift sought by Lawton. Policemen must be paid time and a half for all work over forty hours. To that extent, the Petitioner already receives more straight time from the Respondent without having to pay overtime (TR at 312, 313).

41. The Petitioner's new Battalion Chief job description is more illustrative of the BCs' actual authority, than the testimony by management personnel at the hearing would suggest (Exhibit V): **"with the concurrence of upper levels of management and within prescribed procedures [BCs] may recommend hiring.... "** (emphasis added). The permissive use of "may," the repeated testimonial examples of management overriding BCs' attempted exercise of limited discretionary authority, and the management-dictated strictures denote the limited authority BCs actually enjoy.

42. No Great Falls' BC has ever hired, fired or promoted another fire fighter (TR at 32 and 92). There was no evidence that the BCs' recommendations/appraisals have been taken very seriously, although they prepare written confirmations for promotions. Howard Clos' review of his twenty-five year personnel file contained but three evaluations. There was no contention by the Petitioner that Captain Clos' file was out of the ordinary (TR at 283). BCs' have never had any influence on setting their department's budget (TR at 95). No BC has ever suspended another fire fighter without pay, and the only reported brief suspensions of firefighters by BCs have been immediately countermanded by management (TR at 309).

43. **The BCs' perform some supervisory functions, and have significant duties for fire scene management.** BCs must implement, but have had no authority or participation in setting management policies. From the overall testimony presented, especially that of James Hirose, Captains do more day-to-day routine work planning than BCs. For example, BCs oversee that work scheduled by Captains is done (TR at 119 and 125).

44. James Hirose was hired in the Great Falls Fire Department in 1967, and rose through the ranks. Mr. Hirose became a Battalion Chief in 1985, was appointed Assistant or Deputy Chief in 1990, Acting Chief in September 1994, and made

Chief in February 1995 (TR at 115; Petitioner's proposed findings). Based on his testimony and demeanor, Chief Hirose conveyed truthfulness and a sense of responsibility for his department and the public (TR at 114 to 175).

45. BCs' perform planning activities within management-established "standards." Planned or needed training activities may be developed within approved standards by a BC, and then "run it by the deputy chief or [the Chief]." (TR at 121)

The BCs' exercise of "independent judgment" is constrained by "specific duties" adopted by the Petitioner, according to Chief Hirose (TR at 125): **"They're not - they pretty much are assigned these responsibilities and given - working under the guidelines that are here. They develop their programs from them."** (TR at 125; emphasis added)

46. The Petitioner's minutes of meetings attended by BCs' were prepared by a Petitioner's administrative assistant. There was no showing that any BC ever voted or approved any "minutes" of any meetings in question (TR at 121 to 124).

47. New duties assigned by then Chief Meisinger (hazardous materials, training, planning and facilities) had not been part of the BCs'' duties in the past. As a BC, James Hirose had no participation in any budgetary process (TR at 126).

48. Chief Hirose claimed that the BCs' did not always institute some of their admittedly limited disciplinary authority when warranted. Significant matters require consultation with upper management, as John Lawton earlier urged. Earlier examples (in this decision), also establish that a BC's actions, including then BC Hirose's, might be countermanded by higher management. However, rather than apparently offend colleagues on occasion, BCs brought some smaller, proposed disciplinary matters to the Assistant Chief or Chief (TR at 134).

Chief Hirose is found to be generally credible. However, his example of BC Mora being reluctant to take action against Captain Young {failure to maintain radio contact}, if demonstrative, is a weak example of the BCs' alleged reluctance to exercise discipline. Wayne Young was promoted over others, and is now the Deputy Chief.

49. Wayne Young's position that the BCs' should be retained in the bargaining unit has changed since his promotion. His credibility was placed in issue. No other known firefighter has been promoted to Deputy or Assistant Chief without first attaining the rank of BC. By his own admission, the Deputy Chief has been referred to, presumably critical terms by some, as a "brown noser," "kissing up," or "bucking for promotion." However, Wayne Young is also found to be willing to work hard,

"give an honest day's work," and displayed concern for the good of the department.

Wayne Young, before becoming Deputy Chief, disagreed with disciplinary action taken against BC Mora, who was ill on medication and missed a call. Fellow firefighters typically make sure their BC is awake before proceeding to a fire scene, based on issues of safety and courtesy. BC Mora's membership in the unit has not caused strife (TR 304, 305). While Deputy Chief Young may have become aware of other perspectives since assuming his new management position, his contemporaneous and negative reaction to disciplinary action taken against BC Mora, is found to be a more genuine response (TR 240 - 250).

50. Mr. Meisinger instituted the wearing of collar brass for FD officers. While visiting a fire hall, Mr. Meisinger observed Engineer Talbert Bryan wearing a union pin on his firefighter's uniform. This angered Chief Meisinger. Mr. Meisinger's testimony that he did not recognize it as a union pin is rejected as incredible.

Rather than directly ordering Mr. Talbert to remove the pin, or discussing the matter, or working out a policy for the wearing of American flags, union pins, collar brass, and any other permissible items, Meisinger ordered action by BC Sisco against Talbert. Meisinger could have defused the situation on the spot.

However, Meisinger was angry that the BC failed to read his mind and take whatever disciplinary action Meisinger was apparently contemplating. Meisinger was angry that a grievance was filed. However, the matter resolved in an orderly manner as contemplated in the contract. The Chief later developed and enunciated a policy for wearing pins (Exhibit 7).

51. The BCs have demonstrated a community of interests with other unit members. The BCs share similar wages, hours, fringe benefits and working conditions. They share similar skills and interests. Chief Hirose acknowledges this in his testimony (TR at 140). By jointly stipulated Finding Nos. 3 and 4, the BCs and other firefighters prove a long history of collective bargaining. There was no question that common personnel policies are shared among the members of Local # Eight. Testimony uniformly supports an integration of work functions, and direct, daily interchange among the affected employees. The wishes of the affected workers strongly support the retention of the BCs in the recognized bargaining unit (Finding No. 28).

52. BCs do somewhat less menial cleaning chores than lower ranking firefighters, however. The Petitioner would undoubtedly save money if the BCs were removed from the unit.

53. Section 1.2 of the collective bargaining agreement most recently in effect provides (Exhibit 1):

It is the purpose of this agreement to achieve and maintain harmonious relations between the City and the Union, and to establish proper standards of wages, hours and other conditions of employment.

Article 2, the Recognition Clause of Section 2.1 provides:

The City recognizes the Union as the exclusive collective bargaining agent for all uniform members, excluding the chief, assistant chief and fire marshall, and all initial probationary employees of the Great Falls Fire Department.

54. The overwhelming weight of the evidence supports a finding that to the extent "strife" has occurred, it has not been caused by the BCs membership in the union (Finding No. 28). All non-management personnel credibly denied that the BCs' membership in the union had caused problems.

The grievances cited by the parties merely establish that differences can be resolved within the existing framework of the grievance procedure. In the four year's prior to Chief Meisinger's tenure, about **one grievance a year** was filed. During Mr. Meisinger's term as Chief, Ron Meyers estimated between 15 to 20 grievances were filed. **No reported grievances have been filed since Mesinger's departure.** The Petitioner submitted no evidence whatsoever to dispute the Respondent's figures (TR at 322, 323).

55. Linda Williams has been in charge of City Personnel since 1981. She participates in contract negotiations, among many other duties. Linda Williams did not sit on any recent

firefighter hiring panels, but one of her subordinates did. Firefighters, including BCs' did not participate in creating or grading the tests used for new hires. Linda Williams rarely visited fire halls, except for insurance paper work, or the like. What negative comments Ms. Williams heard about the union came from management personnel (TR at 175 to 225).

56. Linda Williams was present and took notes at an August 10, 1993, negotiation session with the Respondent's representatives. Exhibit X contains Ms. William's account of remarks made by John Lawton during that bargaining session regarding removing BCs' from the bargaining unit (Mr. Lawton did not deny the remarks during his own testimony): **"When we go to unit determination we're not going to be too kind."**

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction in this matter pursuant to Sections 39-31-104, and 39-31-105, MCA.

2. A. The Petitioner meets the filing requirements of ARM 24.26.630 for this Unit Clarification Petition. The Board's rules were adopted pursuant to Sections 39-31-202, and 39-31-207, MCA. The conclusion that this Petition is in order ratifies the same preliminary rulings prior to the hearing, and is based on Finding Nos. 7 and 8. The elements of 24.26.630 are set out below:

24.26.630 PETITION FOR UNIT CLARIFICATION OF BARGAINING UNIT

(1) A petition for clarification of bargaining unit may be filed with the board by an exclusive representative of the bargaining unit in question or by the public employer only if:

- (a) there is no question concerning representation;
- (b) the parties to the agreement are neither engaged in negotiations nor within 120 days of the expiration date of the agreement, unless there is mutual agreement by the parties to permit the petition;
- (c) a petition for clarification has not been filed with the board concerning substantially the same unit within the past 12 months immediately preceding the filing of the petition; and
- (d) no election has been held in substantially the same unit within the past 12 months immediately preceding the filing of the petition.

(2) A copy of the petition shall be served by the board upon the bargaining representative if filed by a public employer and upon the employer if filed by a bargaining representative.

(3) A petition for clarification of an existing bargaining unit shall contain the following:

- (a) the name and address of the bargaining representative involved;
 - (b) the name and address of the public employer involved;
 - (c) the identification and description of the existing bargaining unit;
 - (d) a description of the proposed clarification of the unit;
 - (e) the job classification(s) of employees as to whom the clarification issue is raised, and the number of employees on each such classification;
 - (f) a statement setting forth the reason why petitioner desires a clarification of the unit;
 - (g) a statement that no other employee organization is certified to represent any of the employees who would be directly affected by the proposed clarification;
 - (h) a brief and concise statement of any other relevant facts; and
 - (i) the name, affiliation, if any, and the address of petitioner.
- (4) The party on whom the petition was served shall have 20 days to file a response with the board.

- (5) Upon a determination that a question of fact exists, the board shall set the matter for hearing. Upon completion of the hearing the board may:
- (a) grant the petitioned for clarification in whole or in part, or
 - (b) deny the petitioned for clarification in whole or in part.

B. The Respondent did not specifically contest that the Petitioner met the above elements for filing the Unit Clarification Petition. Rather, the Respondent claimed generally that the Petitioner, by signing contracts with and recognizing the Respondent (Section 39-31-109, MCA), had waived or abandoned the right to seek this unit clarification.

The record is replete that the Respondent clearly knew of the likelihood, and in fact, imminence of this UC (Finding No. 11; Petitioner's proposed conclusion of law, no. 3 cites numerous supporting transcript pages). There was no abandonment or waiver by the Petitioner of its option to file the petition. Moreover, there can be no "waiver" or "abandonment" (of the right to file a petition) absent a "clear and unmistakable showing of waiver." "Such a relinquishment must be in clear and unmistakable language." (Tide Water Associated Oil Company, 24 LRRM 1518 at 1519 and 1520, 85 NLRB 1096; and Timken Roller Bearing Company v. NLRB, 54 LRRM 2785 at 2789 [1963]).

3. A. The position of Battalion Chief within the Great Falls Fire Department in practice lacks sufficient elements of

authority to meet the "supervisory" definition as contemplated by Section 39-31-103 (11), MCA. The BCs' have and continue to be responsible for some factors enumerated in this test and meet many of the secondary subtests listed below.

39-31-103. Definitions. When used in this chapter, the following definitions apply:

(11) "Supervisory employee" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

No BC can hire, or effectively recommend the same. No BC can "transfer" employees, but only trade between fire stations to cover his platoon or company. To some extent, BCs may assign workers to particular equipment for which they are qualified. This element is a minor one. By statute BCs' cannot suspend without pay (Sections 7-33-4123, 7-33-4124, MCA). When now Chief Hirose was a BC and attempted to suspend a firefighter with pay, he was immediately countermanded by management (Finding Nos. 50 - 54).

BCs' have never had authority to lay off or to recall workers. Uniform testimony established that lay offs and recalls take place pursuant to negotiated contracts, and recalls are subject to approval by the City Manager (Finding No. 15).

There was no substantial argument or evidence offered as to whether BCs have any power to "reward" fellow workers. It appears that salary and all remuneration is set by contract following negotiations between the Petitioner and Respondent.

The BCs have the authority to discipline. Their authority includes the responsibility to issue oral and written reprimands and suspensions with pay. Testimony was mixed as to how this authority has been exercised. Some attempts at exercise have been countermanded by management. John Lawton emphasized that serious discipline required consultation up the chain of command to at least him (Finding No. 18). The BCs' authority over all lower ranks, their inherent responsibilities' as "shift commanders" and responsibility for fire scene management entails a need to discipline. On balance, BCs meet this subtest.

BCs direct the work of their platoon and company. They review the plans of their Captains. They must insure that management directives are obeyed and training objectives are completed. While much of their direction takes place within a management-imposed framework, in this area, some degree of independent judgment must take place. This subtest is met.

BCs lack sufficient authority to effectively adjust grievances. BCs can and should "defuse" and solve some problems and disagreements and thereby obviate the need for management

action. Uncontroverted testimony showed that the "E" Board does resolve disputes. However, many disagreements cannot be solved by BCs. BCs lack power to go against management orders when such order are at issue. The examples put forth by both parties demonstrate the lack of power BCs have to realistically settle many of the disagreements BCs may encounter between workers and management. For example, BCs' cannot grant vacations when management does not approve. On balance, the history of the Great Falls Fire Department does not show that BCs enjoy the right or responsibility to adjust many of the grievances which have arisen (Finding Nos. 36-43; 45 and 47).

In Yeshiva University v. NLRB, 444 US 672, 103 LRRM 2526 (1980), **the U.S. Supreme Court, listed 18 additional subtests, or "secondary tests".** These are not the controlling tests enumerated in Section 39-31-103 (7), MCA. The parties did not specifically address or list all 18. A few of the these 18 have been argued, and for some of the 18, no evidence was shown or mention made.

Those "secondary" subtests deemed relevant establish that the position of Battalion Chief at least closely approaches, if it does not fully meet, "supervisory" status. The undersigned does not attempt to reconcile the seemingly contradictory outcome of these two sets of tests (statutory and secondary), except

through the required application of **"the grandfathering clause,"** discussed below (Section 39-31-109, MCA). Counsel have suggested, and the Hearing Officer notes, that resolution of this dispute may require adjudication by our state Supreme Court.

BCs' do "receive and transmit orders" directly from management; they have always lacked authority to "interpret" management policies. They are responsible for "inspecting" the work of others, particularly Captains. They must occasionally "instruct" their fellow workers of lesser rank. Only within limited circumstances may BCs' "grant or deny leave to others." Management has both forbidden and overridden BCs' decisions in this arena. BCs' bear a general responsibility to "report rule infractions." There was insufficient evidence whether BCs "wear different clothing." There was no evidence whether the earlier "collar brass" policy of Meisinger remains in effect.

The BCs' have responsibility for a "shift" or a phase of operations. There was no serious dispute to the Petitioner's contention that the BCs' function as "shift commanders." BCs' are generally "widely regarded" by colleagues and management as "supervisors" or are similar to "foremen." By history BCs have occasionally, but not regularly attended "meetings or sessions" held for supervisory personnel. Current practice was not introduced by the parties. However, BCs were largely excluded

from genuine discussions and meetings by then Chief Meisinger. There was no specific showing of "special privileges." BCs' apparently enjoy somewhat higher pay levels than other firemen, but there was no evidence on pay apart from BC Mora's single pay stub and Manager Lawton's generalities about the expenses he bore. There was no evidence whether any "pay differentials are not based solely on skills."

There was no evidence whether any firefighter "punches a time clock." **In contrast to those federal subtests the BCs appear to meet, the BCs' are paid overtime.** While the Petitioner by contract pays the BCs what the Petitioner terms a "salaried basis," when carefully examined, for purposes of the limited analysis required here, BCs are paid hourly; if not, there would be no need to compute or budget for BCs' overtime hours. Of the personnel discussed, only the Chief, Deputy Chief, and Fire Marshall are bona-fidely salaried, and receive straight salaries, regardless of hours worked.

The Petitioner correctly cites SEIU, Local 102 v. County of San Diego, 35 F.3d 483 (9th Cir. 1994), as amended on denial of rehearing and suggestion for rehearing en banc at 60 F.3d 1346 (1995), but only as that case pertains to "salaried" status for public employees. That case concerned a claim for overtime wages. Those public-sector workers (not firefighters) failed the

1991 and 1992, federal regulatory "salary test" stricken in that case. The Ninth Circuit Court of Appeals concluded that the U.S. Department of Labor defaulted on its mandate to interpret the FLSA and to recast relevant regulations. Congress intended the exemptions of 29 USC 213 (executive, administrative and professional) "exemptions" from overtime wage requirements to be available to the public sector as well. Yet, San Diego's public pay practices, perhaps similar to Great Falls, contain public accountability pay practices which reflect "hourly pay."

Nevertheless, SEIU, supra, did not overturn, alter the result, nor expressly overrule Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991), as the Petitioner implied. Abshire, supra, did concern firefighters. In Abshire, supra, that county's Battalion Chiefs remained in the recognized bargaining unit.

The parties here did not argue the comparability of California's and Montana's respective "duties" tests. Salary test is but one test to be considered in examining "exempt" status for overtime wages. Other U.S. Circuit Courts of Appeals have reached different conclusions {see Aaron v. City of Wichita, 54 F.3d 652, 658 (10th Cir. 1995)}. At all events, the instant case is not directly concerned with any claim for overtime wages.

B. The position of Battalion Chief has never approached the definition of "management official" (Section 39-31-103 (7), MCA). The language of this provision is set forth below:

39-31-103. Definitions. When used in this chapter, the following definitions apply:

(7) "Management official" means a representative of management having authority to act for the agency on any matters relating to the implementation of agency policy.

The Montana Supreme Court looks to the construction placed on the National Labor Relations Act (NLRA) by the federal courts as an aid in interpretation of the Montana Public Employees Collective Bargaining Act. Small v. McRae, 200 Mont. 497, 651 P.2d 982 (1982), followed in Brinkman v. State, 224 Mont. 238, 729 P.2d 1301 (1986).

The Petitioner has not emphasized that only those employees who both "**formulate** and effectuate management policies by expressing and making operative the decisions of their employer" fit the "management" exemption carved out of the right for employees to collectively bargain. (See Palace Laundry Dry Cleaning Corp., 75 NLRB 320, 21 LRRM 1039 (1947); also quoted with approval in Yeshiva University, supra. The Great Falls Battalion Chiefs do not formulate Departmental policies. Only the Fire Chief and the Deputy Chief, in conjunction with the City Manager, the City Commission, and with benefit of counsel, formulate policies.

In Yeshiva, supra, the U.S. Supreme Court said "managerial employees must exercise discretion within or even independently of established employer policy and must be aligned with management." Here, the Petitioner's BCs position description sets down the limits and constraints on the presumed authority the BCs' are to exercise. This Petitioner-generated document is evidence of the limitations which have traditionally restricted the BCs' authority to operate independently, or to exercise discretion and independent judgment beyond policies handed down from upper levels of management (Finding No. 48).

4. The Battalion Chiefs continue to meet both the Board of Personnel's tests and the National Labor Relations Board's [NLRB] tests for inclusion within the recognized bargaining unit (Finding Nos. 35-43, 47-49; 51-54).

The statutory requirements are set out in Section 39-31-202, MCA:

39-31-202. Board to determine appropriate bargaining unit -- factors to be considered.

In order to assure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of

work functions and interchange among employees affected, and the desires of the employees.

The demonstrated community of interests, wages, hours, fringe benefits, history of collective bargaining, common supervision, common personnel policies and the complete integration of work functions and interchange among the affected employees, and the clear and unequivocal desire of the employees have all been met (ARM 24.26.611).

The cohesiveness of the employees in the unit was amply shown (Finding No. 34). The NLRB has been reluctant to disturb longstanding bargaining units and bargaining history is customarily accorded great weight. Tool Craftsmen v. Leedom, 276 F.2d 136, 45 LRRM 2826 (CA DC), cert. denied, 364 US 815 (1960).

Our Montana Supreme Court recognized this principle in Billings Firefighters, supra. Unit composition, however, is not set in stone. However, in this case, there has been no showing of sufficient reasons or bona fide factors to disturb the status quo. The undersigned is mindful that the Petitioner's cost concerns are legitimate. Yet, economic hardship arguments alone cannot prevail given the statutory framework (See Peters v. State Cascade ADV-91-1172; summary judgment December 21, 1994 and settlement March 8, 1995, reported in Montana Law Week, 7/22/95).

The Petitioner's reliance on Unit Clarification No. 6-80 v. Department of Administration, 217 Mont. 230, 703 P.2d 862 (1985), is misplaced. **That case is distinguished as the instant case has no proposed change of the recognized bargaining representative.** The I.A.F.F. has not been challenged. In Unit Clarification, No. 6-80, supra, the workers' representative was decertified and replaced by another union. That case is therefore inapposite.

5. The inclusion of the Battalion Chiefs within the bargaining unit has not created conflicts of interest, nor been a source of strife within the unit. The BCs' union membership has not caused "actual substantial conflict (Billings Firefighters, supra at 427). "

Section 39-31-101, MCA states:

39-31-101. Policy. In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.

The undersigned notes but does not fully explore the Respondent's argument that the Board may have engaged in improper rule adoption with the second requirement it imposed through its "two-prong test" enunciated on July 28, 1978, in its early-stage

review of the Billings Firefighter case above. The Respondent claims that the requirements for public rule notice, comment, and rule adoption under the Montana Administrative Procedure Act, at Section 2-4-305 (5), MCA were not followed. The Respondent's arguments are set out in the Respondent's proposed conclusions of law, pages 29 to 32. As the arguments touch on other constitutional and rule-making standards, they are preserved for any appellate review. It does not appear appropriate for an agent of the Board to presume to rule on the legality of what appear to be earlier (1978) Board rules. Such an offer by counsel to examine this second test is not essential to the outcome here, as the question is answered favorably to the Respondent.

That second "question," as stated by the Respondent reads:

If it does [is the position management or supervisory], does the inclusion of that position in the bargaining unit create an actual substantial conflict which results in the compromising of the interests of any party to its detriment?

If accurately quoted, the second prong does raise an interesting perplexing question. That is, any party to a labor dispute or unit clarification would presumably always maintain that its interests are somehow compromised by the inclusion or exclusion of certain individuals and jobs.

The Supreme Court decided in the Billings Firefighters, supra at 434, that "no actual substantial conflict exists." This Hearing Officer concludes the same as it pertains to the Battalion Chiefs' twenty-nine year membership in the Great Falls Fire Department. The Petitioner has not focused on conflicts within the unit, but rather on external conflicts, found to have largely been fostered by the Petitioner's antagonism to the bargaining unit. John Lawton admitted under cross examination that when labor disputes had arisen, they had been settled professionally within the terms of the contract(s) (Finding No. 17). Mr. Lawton's prepared statements for the City Commission quoted in Finding No. 9, include: "I think our discussions have been respectful...I don't think that we have had the kind of animosity... (Exhibit B, 3).

Much of the unfortunate disagreements cited by the Petitioner can be honestly attributed to Richard Mesinger's behavior toward Respondent and his management style. The spike in complaints/grievances during his twenty-two month tenure was an aberration in typical Great Falls labor-management relations (Finding No. 54). Grievances, moreover, are a right of both parties.

The attitudes toward the Respondent as evinced in the words of John Lawton and Richard Mesinger, and quoted at length in

Finding Nos. 9, 13, 17, and 29 - 38 and 50, establish the source of "strife," to the extent it exists. The Petitioner ignored recommendations by BCs (Finding No. 36), and provoked most of the grievances referenced in Finding Nos. 37 - 43 and 45, 47). The Petitioner-adopted new job description (Exhibit V) emphasizes how little authority is conferred on the BCs, as does one of BC Sisco's efforts at discipline (Finding Nos. 41 and 48).

The Petitioner failed in its burden of proof to disturb the status quo of "grandfathered" workers protected by the 1973 law (Section 39-31-109, MCA):

39-31-109. Existing collective bargaining agreements not affected. Nothing in this chapter shall be construed to remove recognition of established collective bargaining agreements already recognized or in existence prior to July 1, 1973.

The right to self-organization, the wishes of the workers, including all but one unit member contacted, the longstanding history, the appropriateness of the unit, and ultimately, the promotion of the public policy set out in Section 39-31-101, MCA above, lead to a denial of the Petitioner's request.

This decision acknowledges Conclusion No. 3. A., that under the application of the "secondary" tests apart from the "primary" tests to determine what are "supervisory positions," the BCs would not meet the definition of "public employee." (Section 39-31-103 (9) (iii), MCA). The Montana Supreme Court ruled in

Billings Firefighters, supra, at 432, that the inclusion of supervisory personnel or management officials in the bargaining unit is not inherently conflicting. If the BCs were otherwise excludable as supervisory personnel, the "grandfathering" provision protects them, based on the evidence presented to date.

VI. RECOMMENDED ORDER

The Petitioner's request filed on June 16, 1994, to remove the Great Falls Fire Department Battalion Chiefs from the recognized bargaining unit, the I.A.F.F. Local No. 8, is DENIED.

DATED this ____ day of May, 1996.

BOARD OF PERSONNEL APPEALS

By:

Stephen L. Wallace
Hearing Officer

In accordance with ARM 24.26.215 (2), the parties have twenty (20) days in which to file written exceptions with the Board after service of the recommended order upon the parties. The recommended order may become the final order of the board, and the board has additional powers pursuant to ARM 24.26.630 (5) (a) and (b). The Board of Personnel Appeal's address is P.O. Box 1728, Helena, Montana 59624.

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

David V. Gliko
City Attorney
PO Box 5021
Great Falls, MT 59403-5021

Timothy J. McKittrick
MCKITTRICK LAW FIRM, P.C.
PO Box 1184
Great Falls, MT 59403

DATED this _____ day of May, 1905.